

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Section 1.17 of the	)	GC Docket No. 02-37
Commission's Rules Concerning Truthful	)	
Statements to the Commission	)	
	)	
	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** March 17, 2004

**Released:** March 23, 2004

By the Commission:

1. By this memorandum opinion and order we deny a petition for reconsideration, filed April 28, 2003, by James A. Kay, Jr. (Kay). Kay seeks reconsideration of our action amending 47 C.F.R. § 1.17 of the Rules, and denying a related petition for rulemaking filed by Kay. Amendment of Section 1.17 of the Commission's Rules, 18 FCC Rcd 4016 (2003) (R&O). Kay challenges the Regulatory Flexibility Certification contained in that action and also challenges the denial of his petition for rulemaking. Additionally, we make an editorial amendment to 47 C.F.R. § 76.939, which we amended to conform to the modified section 1.17.

**I. REGULATORY FLEXIBILITY CERTIFICATION**

2. The Commission amended section 1.17 to achieve a clearer, more comprehensive, and more focused articulation of the standards applicable to regulatees with respect to their obligation to make truthful statements to the Commission. R&O, 18 FCC Rcd at 4016 ¶ 1. The Commission also intended that the new rule would enhance the effectiveness of our enforcement efforts. *Id.* Among the standards the Commission adopted was to provide that no person subject to the rule shall:

in any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a

reasonable basis for believing that any such material factual statement is correct and not misleading.

47 C.F.R. § 1.17(a)(2)(as amended). See R&O, 18 FCC Rcd at 4025.

3. In his petition for reconsideration, Kay does not substantively challenge the standards the Commission adopted. He does, however, take issue with the Commission's Regulatory Flexibility Certification as it relates to the "reasonableness" or "due diligence" standard described above. The Certification stated that: "We believe that the rule we adopt today will not have a significant economic impact on a substantial number of small entities." R&O, 18 FCC Rcd at 4023-24 ¶ 20. Kay contends that this statement is "sheer speculation" (Petition for Reconsideration at 2) and that a due diligence requirement may impose a significant burden on small businesses.

4. As we made clear, however, the "reasonableness" standard requires no more than that regulatees exercise a degree of diligence reasonable under the circumstances to ensure that statements to the Commission are accurate and not misleading. R&O, 18 FCC Rcd at 4021 ¶ 11. We do not intend to impose any arbitrary or unrealistic burdens on any person subject to the rule, including small entities. Id. We therefore see no basis for believing that the rule might have a significant economic impact on small entities.

## II. PETITION FOR RULEMAKING

5. Kay attached to his comments in this proceeding a copy of a petition for rulemaking filed March 5, 2002.<sup>1</sup> In his petition, Kay proposed several modifications to the Commission's investigatory and hearing procedures. The Commission found Kay's proposals without merit. The Commission stated that:

Several of Kay's proposals would unduly burden the Commission's investigatory and hearing functions.<sup>fn</sup> Other matters are already adequately addressed by existing law and policy.

[fn] Kay proposes to: (1) prohibit confidential complaints, (2) make compliance with section 308(b) of the Communications Act voluntary and subject to immediate Commission and judicial review, (3) require service of a bill of particulars before issuance of a hearing designation order, (4) separate regulatory and investigatory functions at the bureau level, and (5) bar bureaus from participating in the consideration of applications for review.

R&O, 18 FCC Rcd 4023 ¶ 19.

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<sup>1</sup> Kay disputes the Commission's statement (R&O, 18 FCC Rcd at 4023 ¶ 19) that the petition was filed March 5, 2002. Although the pleading was dated December 4, 2001, as Kay claims, the copy received from the Secretary's Office was stamped as received March 5, 2002.

6. Kay asserts that the foregoing discussion arbitrarily ignored the merits of his proposals. Kay complains that the Commission did not issue a public notice relating to his petition and did not assign it a rulemaking number. He also complains that the Commission did not explain in detail how the proposals would be unduly burdensome or what matters were addressed by existing law. He explains that in making his proposals he took great pains to balance due process concerns with the Commission's enforcement powers and duties. Kay maintains that, while the Commission is free to disagree with his balancing, the Commission must address each specific proposal and indicate why each proposal lacks merit or would otherwise not be in the public interest.

7. We disagree with Kay's characterization of our responsibilities. Under 47 C.F.R. § 1.401(e), we have broad authority to summarily deny petitions for rulemaking that "plainly do not warrant consideration." See Application for Review of McKinnon Broadcasting Co., 7 FCC Rcd 7554, 7554 n.1 (1992). See also General Motors Corp. v. National Highway Traffic Safety Commission, 898 F.2d 165, 169 (D.C. Cir. 1990) (judicial review of an agency's denial of a petition for rulemaking is "especially narrow"); WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C. Cir. 1981) ("It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking"). We find that Kay's petition plainly does not warrant consideration.

8. In our view, Kay's proposals clearly threaten to impose an undue burden on the Commission's investigatory and adjudicatory processes. The first two proposals listed above would interfere with necessary access to information in investigations by discouraging informants who seek guarantees of confidentiality from coming forward to the Commission and by discouraging compliance by regulatees with Commission requests for information. The third proposal would add an unnecessary and burdensome extra layer of procedure to the adjudicatory process and impair staff discretion prior to issuing a hearing designation order. The fourth and fifth proposals would interfere with the efficient allocation of staff resources among the Commission's operating bureaus and offices by impairing the sharing of resources and requiring duplicative efforts. As Kay suggests, we indeed strike a different balance from the one he proposes. In no case do we find that Kay has advanced sufficiently compelling due process concerns to warrant modifying existing practice. Similarly, Kay has advanced no compelling basis to overturn existing law and practice relevant to his remaining proposals, which involve settlements, burdens of proof, the processing of applications, and discovery. We believe that existing law and practice appropriately balance due process and other public interest considerations

### III. SECTION 76.939

9. When the Commission amended section 1.17, it also made a conforming edit to section 76.939, the section that applies a truthfulness requirement specifically to cable operators. R&O, 18 FCC Rcd at 4022 n.7. The section, as amended by the Report and Order, currently reads:

**76.939 Truthful written statements and responses to requests of franchising authority**

Cable operators shall comply with franchising authorities' and the Commission's requests for information, orders, and decisions. Any information submitted to a franchising authority or the Commission in making a rate determination pursuant to an FCC Form 393 (and/or FCC Forms 1200/1205) filing or a cost-of-service showing is subject to the provisions of 1.17 of Part 1 of these rules.

The rule, as amended by the Report and Order, inadvertently did not list all of the applicable FCC forms to which it was intended to apply. To remedy this error, rather than specifically listing all of the forms, we will amend the rule to state generally that it applies to any form or cost-of-service showing, as follows:

**76.939 Truthful written statements and responses to requests of franchising authority**

Cable operators shall comply with franchising authorities' and the Commission's requests for information, orders, and decisions. Any information submitted to a franchising authority or the Commission in making a rate determination pursuant to an FCC Form or a cost-of-service showing is subject to the provisions of 1.17 of Part 1 of these rules.

**IV. ORDERING CLAUSES**

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed April 28, 2003, by James A. Kay, Jr., IS DENIED.

11. IT IS FURTHER ORDERED, That 47 C.F.R. § 76.939 IS AMENDED to read as indicated in the attached appendix.

**FEDERAL COMMUNICATIONS COMMISSION**

Marlene H. Dortch  
Secretary

## Appendix

### Rule Change

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

#### **PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

1. The authority citation for part 76 continues to read as follows:

**Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303A, 307, 308, 309, 312, 315, 317, 325, 338, 339, 503, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544A, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, AND 573 unless otherwise noted.**

2. Section 76.939 is revised to read as follows:

§ 76.939 Truthful written statements and responses to requests of franchising authority.  
Cable operators shall comply with franchising authorities' and the Commission's requests for information, orders, and decisions. Any information submitted to a franchising authority or the Commission in making a rate determination pursuant to an FCC Form or a cost-of-service showing is subject to the provisions of 1.17 of Part 1 of these rules.